In the District Court of the United States for the Western District of Oklahoma

No. 11379 Cr.

UNITED STATES OF AMERICA, PLAINTIFF

v.

BEN KAPP, BERT COX, TOM WOODS, ALIAS T. C. WOODS, RALPH MCLARTY, ALIAS RALPH MCCLARDY, LEE HOPPER, and L. L. GREEN, ALIAS LINDSEY GREEN, DEFENDANTS

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is confererd by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28, of the United States Code.

B. The statutes of the United States, the construction of which is involved herein, are Sections 35 and 37 of the Criminal Code (U. S. C., Title 18,

Sections 80 and 88). Section 35 of the Criminal Code is as follows:[1]

> Presenting false claims; aiding in obtaining payment thereof. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of

[1] This section, as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996, is as follows: "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Section 37 of the Criminal Code is as follows:

Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

C. The judgment of the District Court sought to be reviewed was entered on April 6, 1937, and an

application for appeal was filed on May 4th, 1937, and is presented to the District Court herewith, to-wit: on this the 5th day of May 1937.

The indictment in this case is in two separate counts, each of which is based upon Section 37 of the Criminal Code. The first count is not here involved, as no error is assigned to the order sustaining demurrers to that count. The second count alleges a conspiracy by the defendants to violate Section 35 of the Criminal Code, as amended, by making and presenting false claims and representations whereby the defendants would obtain from the United States monies in payment of benefits to which they were not entitled. Demurrers to the indictment were filed by the defendants Ben Kapp, Bert Cox, Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green, and were sustained by the District Court. In its opinion the Court held that the demurrers must be sustained as to the second count, which charges a conspiracy to violate Section 35 of the Criminal Code, as amended, because that section does not penalize false claims and representations made to secure benefits under a statute (the Agricultural Adjustment Act) which is unconstitutional. The Court held that in these circumstances the falsity of the representations did not relate to a material fact within the meaning of Section 35 of the Criminal Code.

The question decided by the District Court is a substantial and important one, and the decision ap-

pears to be in conflict with the decisions in *Madden* v. *United States*, 80 F. (2d) 672 (C. C. A. 1st), certiorari denied, 297 U. S. 710; *United States* v. *Harding*, 81 F. (2d) 563 (App. D. C.); and *Langer* v. *United States*, 76 F. (2d) 817, 824–825 (C. C. A. 8th).

The following decisions are believed to sustain the jurisdiction of the Supreme Court:

United States v. *Heinze*, 218 U. S. 532.
United States v. *Hastings*, 296 U. S. 188.
United States v. *Bitty*, 208 U. S. 393, 399.
United States v. *Keitel*, 211 U. S. 370.

Appended hereto is a copy of the opinion of the Court filed April 6, 1937.

Respectfully submitted.

STANLEY REED,
Solicitor General.
William C. Lewis,
WILLIAM C. LEWIS,
United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 11379 Cr.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

BEN KAPP ET AL., DEFENDANTS

OPINION ON DEMURRER TO INDICTMENT

An indictment in this case was returned at the January 1935 Term of District Court on November 29, 1935, charging the defendants in the first count with a conspiracy to violate Sections 2 and 8 of an act known as Public Act No. 10, of the 73rd Congress, entitled "An Act to Relieve the Existing National Economic Emergency by Increasing Agricultural Purchasing Power, to Raise Revenue for Extraordinary Expenses Incurred by Reason of Such Emergency, To Provide Emergency Relief with Respect to Agricultural Indebtedness, to Provide for the Orderly Liquidation of Joint Stock Land Banks and for other purposes."

This act, which the defendants are charged with having violated, or having conspired to violate, was held unconstitutional and void by the Supreme Court of the United States on the 6th day of January, 1936.

If this act was void then no offense is charged in the first count of the indictment because the defendants could not be charged even under Section 88, Title 18, U. S. C. A., the conspiracy statute, with conspiring to violate a law which was not in existence for, under the decision of the Supreme Court, the law was void ab initio.

The Second Count alleges the same state of facts and charges the defendants with conspiring to violate Section 80, Title 18, U. S. C. A., entitled "Presenting False Claims; Aiding in Obtaining Payment Thereof", which is as follows:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stock-

holder, shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, toll, account, claim, certificate, affidavit, et cetera.

The overt acts charged, which would be material in this court, are that hogs were shipped under the representation by the defendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.

There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.

This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls.

The demurrer to the indictment, as to each count, is sustained. An exception is allowed.

EDGAR S. VAUGHT,
United States District Judge.

(Endorsed:) Filed May 4, 1937. Theodore M. Filson, Clerk. By Margaret P. Blair, Deputy.

U. S. GOVERNMENT PRINTING OFFICE: 1937